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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

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11 UNITED STATES OF AMERICA,) Case No.: 2:08-cr-353-RLH-RJJ
12 Plaintiff,)
13 vs.) **O R D E R**
14 PEDRO GARCIA,) (Motion for Relief from Judgment – #130)
15 Defendant.)
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17 Before the Court is Defendant Pedro Garcia's Motion for Relief from Judgment
18 (#130, filed Feb. 20, 2014) based on the Court denying his Motion under 28 U.S.C. § 2255 for
19 ineffective assistance of counsel. The Court does not require a response from the Government. For
20 the reasons discussed below, the Court denies Defendant's motion.

21 **BACKGROUND**

22 On June 7, 2010, a jury convicted Defendant on charges of possession of
23 methamphetamine and felon in possession of a firearm. On April 19, 2013, Defendant brought his
24 § 2255 motion asserting ineffective assistance of counsel. The Court referred the matter to the
25 Government for a response within 45 days. (#125). The Court also set the briefing schedule
26 allowing Defendant 15 days to reply to any response filed by the Government. (*Id.*) The

1 Government filed a response on June 6, 2013. Defendant did not file a reply. On June 26, 2013,
 2 five days past Defendant's deadline to reply, the Court entered the Order denying the § 2255
 3 motion. (#129).

4 Now, Defendant moves for relief from the Order denying the § 2255 motion
 5 arguing that he did not file a Reply because he "lost legal representation" and that the Court denied
 6 the motion without considering his Reply. (#130). Thus, Defendant requests the Court re-enter its
 7 prior Order to "restart the time for him to file his Certificate of Appealability and Notice of
 8 Appeal."

9 **DISCUSSION**

10 Under Rule 60(b), a court may relieve a party from a final judgment, order or
 11 proceeding only in the following circumstances: (1) mistake, inadvertence, surprise, or excusable
 12 neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has
 13 been satisfied; or (6) any other reason justifying relief from the judgment. *Stewart v. Dupnik*, 243
 14 F.3d 549, 549 (9th Cir. 2000). "[A] party merits relief under Rule 60(b)(6) if he demonstrates
 15 extraordinary circumstances which prevented or rendered him unable to prosecute his case."
 16 *Comm. Dental Serv. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002)(internal quotations and citations
 17 omitted). However, to obtain relief for "extraordinary circumstances," the party "must demonstrate
 18 both injury and circumstances beyond his control that prevented him from proceeding with the
 19 prosecution or defense of the action in a proper fashion." *Id.*

20 Defendant's arguments fail under this standard because he has not demonstrated
 21 any circumstances beyond his control that prevented him from filing a timely appeal. When
 22 initially considering the § 2255 motion, the Court extended the normal briefing schedule to allow
 23 Defendant time to reply and he failed to do so. He offers no justification for the delay or failure to
 24 reply. Then, Defendant failed to file a timely petition for certificate of appealability or notice of
 25 appeal. Again, he offers no justification, other than the tenuous argument that he "lost legal
 26 representation." However, as Defendant filed the § 2255 motion *pro se*, he did not lose legal

1 representation in the interim justifying his failure to timely seek a certificate of appealability.
2 Defendant has set forth no reason that would justify withdrawing and re-entering the prior Order or
3 resetting deadlines. Therefore, the motion is denied.

4 Moreover, to the extent that Defendant seeks a certificate of appealability on the
5 merits, the motion is denied. The Court finds there are no appealable issues as to ineffective
6 assistance of counsel because Defendant's arguments were facially meritless. Defendant's
7 arguments raised issues of the validity of the search and admissibility of evidence at trial. These
8 are legal issues to be decided by the Court, not factual issues left to the jury. Accordingly, Defense
9 counsel's failure to argue the matter to the jury was not deficient performance. Instead, Defense
10 counsel argued that the search was invalid and the evidence inadmissible before the magistrate
11 judge, this Court, and later to the Ninth Circuit, where such argument was proper. Defendant's
12 arguments are legally untenable because they show effective, rather than ineffective, assistance of
13 counsel. Thus, the Court cannot certify that Defendant raises appealable issues and denies to issue
14 a certificate of appealability.

15 **CONCLUSION**

16 IT IS THEREFORE ORDERED that Defendant Pedro Garcia's Motion for Relief
17 from Judgment (#130, filed Feb. 20, 2014), is DENIED.

18 Dated: February 12, 2014.

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21 **ROGER L. HUNT**
22 **United States District Judge**